IN THE

# Supreme Court of the United States

**October Term, 1961**

**No. 236**

HARRY LANZA,

*Petitioner,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

**On Writ of Certiorari to the New York Court of Appeals**

## BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK

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### Pertinent Statutes

Section 1330 of the Penal Law, upon which the indictment is based, reads as follows:

"**§1330. Refusing to testify**

"A person who being present before either house of the legislature or any committee thereof authorized

to summon witnesses, wilfully refuses to be sworn or affirmed, or to answer any material and proper question, or to produce upon reasonable notice any material and proper books, papers, or documents in his possession or under his control, is guilty of a misdemeanor."

The immunity provisions in the Penal Law, pursuant to which the defendant was summoned to appear as a witness, was offered immunity and was ordered to testify, are the following:

"**§381. Offender a competent witness; witnesses' immunity.**

"1. A person who has violated any section of this chapter relating to bribery or any section of this article [Art. 34] or who has committed an attempt to violate any such section is a competent witness against another person so offending.

"2. In any criminal proceeding before any court, magistrate or grand jury, or upon any investigation before any joint legislative committee, for or relating to a violation of any section of this chapter relating to bribery or any section of this article or an attempt to commit any such violation, the court, magistrate or grand jury, or the committee may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter."

"**§584. Witnesses' immunity**

"In any criminal proceeding before any court, magistrate, or grand jury, or upon any investigation before any joint legislative committee for or relating to a violation of any of the provisions of this article [dealing with conspiracy], the court, magistrate or grand jury, or the committee, may confer immunity in accordance

with the provisions of section two thousand four hundred forty-seven of this chapter.]"

**"§2447. Witnesses' immunity.**

"1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

"2. 'Immunity' as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

"3. 'Competent authority' as used in this section means:

* * *

"(d) A legislative committee or temporary state commission before which a person is called to answer questions or produce evidence in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein; provided that a majority of the full membership of such committee or commission concur therein;

* * *

"Provided, however, that no such authority shall be deemed a competent authority within the meaning of this section unless expressly authorized by statute to confer immunity.

"4. Immunity shall not be conferred upon any person except in accordance with the provisions of this section.

"5. If, after compliance with the provisions of this section, or any other similar provision of law, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate district attorney having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him."

## Questions Presented

Are there counts in the indictment which will support the judgment regardless of the constitutional issues?

Were the petitioner's constitutional rights violated by a State Legislative Committee asking him questions predicated upon information gathered by eavesdropping conducted in a state prison?

Is eavesdropping in a prison violative of due process or the search and seizure sanctions of the United States Constitution?

## Statement of the Case

On June 19, 1957, the petitioner was called before the Joint Legislative Committee on Government Operations of the Legislature of the State of New York (R 50), a duly constituted state body, to be questioned concerning any knowledge that he might have pertinent to corruption in the New York State Parole Commission (R 89-90). The Committee, after granting the petitioner immunity from prosecution (R 116-20), directed that he reply to a number of questions (R 120-34). The Committee counsel formulated a majority of his questions based on information independently gathered by another state agency (R 156-72, R 173). Officials at the Westchester County Jail had supplied the Committee with transcripts of three conversations which were obtained by use of an electronic recording device which was installed in a prison visitors' room (R 156-72). A different prison room without a recording device

was used for attorney-client conferences (R 305, 313, 314, 330). The petitioner was a party to one of the overheard conversations (R 156-72, 315).

For failing to answer the questions pursuant to direction, the petitioner was indicted on nineteen separate counts of refusing to testify.[1] Each count in the indictment was based upon a single question which the petitioner refused to answer before the Committee. The trial court found the defendant guilty on each of the nineteen separate counts (R 263) and sentenced him to ten consecutive terms of one year each (R 267-74).

The New York Supreme Court, Appellate Division, First Department, modified the judgment by directing that the terms imposed be served concurrently, and left open the question of the number of crimes committed (R 292-98).

The Appellate Division held in part:[2]

> "It may well be that the refusals to testify herein involved relate broadly to only two separate subjects, the defendant's efforts towards bringing about his brother's release on parole and the conversation had on February 13, 1957 between defendant and his brother. Whether thereby the defendant's 19 refusals to testify as alleged in this indictment constitute only two separate crimes or more, we do not now decide, since the conviction on any one count is sufficient to sustain the sentence as hereby modified. (*People* v. *Faden*, 271 N. Y. 435, 444-445.)."

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1. N. Y. Penal Law §1330.

2. R 297; 10 App. Div. 2d 315, 319 (1st Dept. 1960).

The New York Court of Appeals modified the judgment further, holding that a single crime had been committed, but that the sentence need not be altered (R 300).

The Court of Appeals noted:

> "The Appellate Division having directed that the penitentiary sentences run concurrently and not consecutively and, as so modified, having affirmed the judgment of the Court of General Sessions, we direct that the judgment be further modified by finding defendant guilty of but one crime (*People* v. *Riela*, 7 N. Y. 2d 571). It is clear from the determination of the Appellate Division that the number of crimes of which the defendant was found guilty did not enter into the duration of the sentence imposed."

## Introduction

The petitioner herein asserts a constitutional infirmity in his conviction owing to the manner of obtaining and ultimate use made of conversations between himself and his imprisoned brother. Eavesdropping by certain state officers, he claims, infringed his constitutional rights and questions based thereon, subsequently put to him by a Legislative Committee—which had no part in the eavesdropping—amounted to an "immoral" transgression of due process of law. There is no allegation that the trial at which the petitioner was convicted failed in any manner to comport with constitutional standards.

In addition to the counts allegedly infected by the use of eavesdropping techniques, the petitioner was convicted of failing to reply to certain questions derived from independent, unspecified information.

Because of this Court's announced policy of abstaining from unnecessary constitutional construction and because this case may be determined without reaching the petitioner's constitutional contentions, we first treat herein the severability of the questions which the petitioner refused to answer. We shall then proceed to discuss the alleged constitutional infringements, distinguishing between the utilization of the information at the hearing and its initial acquisition.

## POINT I

**The judgment is fully supported by proof that the petitioner refused to answer two questions not derived from eavesdropping [answering petitioner's Point III (brief, pp. 29-31)].**

The petitioner stands convicted of a nineteen count indictment, the multiple charges of which have been deemed a single crime by the order of the New York Court of Appeals here under review. Each of the nineteen separate allegations involves a refusal by the petitioner to answer a specific question posed to him by a concededly authorized investigative committee of the state legislature. Although convicted of refusal to answer all nineteen questions, there can be no doubt that the petitioner's refusal to reply to any one of the proper questions would suffice to support his conviction of the single crime in question.

Admittedly, a number of the questions put to the petitioner by the Committee were predicated on conversations between the petitioner and his brother which were overheard by means of a concealed electronic device (R. 161-8). Equally well established, however, is the fact that at least

two of the questions fruitlessly posed (incorporated in Counts 1 and 19) were derived from sources wholly unconnected with the eavesdropping. The proof of separate derivation, refuting the petitioner's claim that all questions were "inextricably connected" (brief, p. 29), was adduced at the trial during cross-examination of Mr. Bauman, the Committee's counsel, concerning the basis of the questions he had asked the petitioner (R 159-61).

> "Q. Now, after examining the 19 counts contained in the indictment here, can you tell me whether the data or material on which were propounded your questions were the result of information you gave or gathered from those interceptions? A. I think some of the questions were based upon the recordings of conversations between Joseph and Harry Lanza, and other or others of them as I hastily thumbed through the indictment were not.
>
> "Q. Can you show me one of the 19 questions which were not the result of the tapes which you had available to you? A. The first one that occurs to me and this I do not mean to infer is the only one but you asked me to show you one example, the first one I would like to refer to is the count numbered 18th [*sic.* Actually, 19th] or the last count of this indictment.
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> • • •
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> "Q. Would you read the question, Mr. Bauman, please? A. In the last count of the indictment, so there is no confusion of what I am referring to, which is numbered 18th. [*sic.* Actually, 19th] the question is specified as follows: 'Mr. Lanza, please tell the Committee the name of anyone with whom you spoke during the month of February 1957 about the restoration to parole of your brother Joseph Lanza.'

"Q. You can tell me now, Mr. Bauman, that you didn't ask that question as a result of the information that was made available to you from those tapes? A. I can.

"Q. You can say that without fear of successful contradiction, is that correct? A. Yes, I think so.

"Q. Show me one other question, Mr. Bauman? A. Well, I will start with number One.

"Q. Will you do that please? A. Yes (looking through indictment). In the first count, Mr. Direnzo?

"Q. Yes. A. The question is quoted as follows: 'On February 5th 1957 your brother Joseph Lanza was arrested and returned to prison charged with a violation of parole. Tell the Committee, please, any and all efforts extended by you to assist in obtaining the release of your brother Joseph Lanza on parole or his restoration to parole?'

"Q. You say that you did not gather any material from the tapes upon which to predicate that question, Mr. Bauman? A. I have said and I say, Mr. Direnzo, that that question as well as the previous one was not based upon any material in the tapes.

"Q. You are sure about that? A. Yes."

The indisputable independence of these two questions entirely frees them of any taint which might affect the remaining questions owing to the manner in which the information on which they were founded had been obtained. Thus, even assuming, without conceding, the validity of the petitioner's assertion that the Constitution forbade the utilization of material obtained by eavesdropping, the judgment, resting in part on uncontaminated matter, should be affirmed.[3]

3. See N. Y. Penal Law §§1330. 1937.

This conclusion is compelled by the long established principle that a judgment on multiple counts stands if any count thereunder is sufficient in itself to support it. In *Claassen* v. *United States*,[4] the Court states the principle and recites its history:

> "In criminal cases, the general rule, as stated by Lord Mansfield before the Declaration of Independence, is 'that if there is any one count to support the verdict, it shall stand good, notwithstanding, all the rest are bad.' *Peake* v. *Oldham*, Cowper, 275, 276; *Rex* v. *Benfield*, 2 Bur. 980, 985. See also *Grant* v. *Astle*, 2 Doug. 722, 730. And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only. *Locke* v. *United States*, 7 Cranch, 339, 344; *Clifton* v. *United States*, 4 How. 242, 250; *Snyder* v. *United States*, 112 U. S. 216; *Bond* v. *Dustin*, 112 U. S. 604, 609; 1 Bishop Crim. Pro. §1015; Wharton Crim. Pl. & Pract. §771."

The rule has been reiterated and followed in an unbroken line of decisions down through the years,[5] and is also

4. 142 U. S. 140, 146 (1891).

5. *Evans* v. *United States*, 153 U. S. 584 (1894); *Debs* v. *United States*, 249 U. S. 211 (1919); *Abrams* v. *United States*, 250 U. S. 616 (1919); *Brooks* v. *United States*, 267 U. S. 432 (1924); *Kawakita* v. *United States*, 343 U. S. 717 (1952); and *Barenblatt* v. *United States*, 360 U. S. 109 (1959).

The same doctrine is also well established in New York by opinions of the Court of Appeals. *People* v. *Davis*, 56 N. Y. 95 (1874); *Hope* v. *People*, 83 N. Y. 418 (1881); *People* v. *Cummins*, 209 N. Y. 283 (1913); and *People* v. *Faden*, 271 N. Y. 435 (1936).

applicable to a state judgment on review by certiorari.[6] Following the general rule, three circuit courts recently held that judgments will be affirmed even though some counts are upset for being based upon evidence obtained in violation of the Fourth Amendment.[7]

In a vain attempt to avoid the force of this principle, the petitioner alleges that, but for the eavesdropping, he would never have been called to testify before the Committee (brief, pp. 29-30). This argument, conjectural and speculative at best, is not specifically rebutted by the record. The record, however, does indicate that the Committee had other information (R 90-1, 203) and sought to interrogate the petitioner based on that information (R 159-61, 168, 202-3). The Committee also had available public records[8] which indicated that the petitioner was one of the three people who visited Joseph Lanza in prison (R 315). From these facts, and without any indication of the Committee's other investigatory methods, it is reasonable to infer that the petitioner would have been called as a witness by the Committee even if the transcripts did not exist.

In any event, even if the petitioner was summoned as a result of the overheard conversations, his subsequent ex-

6. *Whitfield* v. *Ohio*, 297 U. S. 431 (1936).

7. *United States* v. *Warren*, 259 F. 2d 142 (7th Cir. 1958); *Cox* v. *United States*, 287 F. 2d 41 (9th Cir. 1961); *Williams* v. *United States*, 260 F. 2d 125 (8th Cir. 1958).

8. The Regulations of the N. Y. State Commission of Correction provide (p. 27):

> "A record should be kept in each jail, giving the name and address of each visitor, date of visit, name of inmate visited, whether the visitor brought a package to the inmate and a statement as to the contents of packages intended for inmates."

amination is not necessarily polluted. It will be recalled that the recent case of *Costello* v. *United States*[9] held that, where an individual is called before a grand jury as a result of illegal wiretaps, any information obtained by questioning him on independent matters is free of contamination and available in a subsequent proceeding. A key similarity exists between *Costello* and the present case. In each case, certain of the questions asked were not based on overheard information and were consequently free of the taint which infected other matters probed at the same inquiry. This Court's discussion of the subject follows:

> "Moreover, District Attorney Hogan testified in the present proceeding. He expressly disavowed that his questions of the petitioner as to his activities during Prohibition were based on the 1943 wiretaps. * * *
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> * * *
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> "It is true that the 1943 wiretaps prompted the calling of the petitioner before the county grand jury and the Official Referee. But the 'fruit of the poisonous tree' doctrine excludes evidence obtained from or as a consequence of lawless official acts, not evidence obtained from an 'independent source.' *Silverthorne Lumber Co.* v. *United States*, *supra*, [251 U. S.] at 392. We said in *Nardone* v. *United States*, 308 U. S. 338, 341, 'Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint.' We are satisfied that any knowledge in Mr. Hogan's possession which impelled the petitioner to answer truthfully came from such independent sources and that any

9. 365 U. S. 265, 279, 280 (1961).

connection between the wiretaps and the admissions was too attenuated to require the exclusion of the admissions from evidence."

In sum, it is evident from the foregoing that the petitioner was convicted on two independent allegations that he refused to answer questions derived from sources uncontaminated by eavesdropping. Since either of these refusals are sufficient to support the judgment, it should be, accordingly, affirmed.

Considering this Court's policy of avoiding unnecessary decisions limiting legislative investigation where another basis for decision exists, the conclusions reached here suggest a logical and demanding basis for the resolution of this instant case. Certainly, the judicial attitude toward legislative inquiry referred to in *United States* v. *Rumely*,[10] which strongly counseled "abstention from adjudication unless no choice is left," is a significant guidepost for decision in the present case.

10. 345 U. S. 41 (1952).

## POINT II

**Due process was not offended by the proceedings of the Legislative Committee hearing [answering in part petitioner's Point I (brief, pp. 11-13)].**

The petitioner's conviction stems from an investigation by a duly constituted Joint Committee of the New York Legislature which called as a witness the petitioner who might have had information pertinent to one of the Committee's lawful and valid legislative objectives. The petitioner appeared, with legal counsel, and declined to answer a series of questions. In essence, the petitioner presently claims that the asking of these questions at the hearing deprived him of due process of law and his refusal to answer was therefore justified.

The most conscientious and painstaking examination of the situation presented by the instant case fails to reveal either deprivation or threat to any substantial right of the petitioner cognizable by the due process protection of the Constitution.

First and foremost, it is clear beyond peradventure that the petitioner was absolutely and completely insulated against danger of criminal conviction on account of cooperation with the Committee. In fact, cooperation was his safest course, for by truthful response to the questions posed, he would have won inviolable immunization against any possible future use of his answers against him. It will be recalled that, following the petitioner's initial refusal to answer on grounds of possible self incrimination,[11]

11. See N. Y. Constitution Art. I §6.

he was granted "full immunity" (R 120).[12] There is no claim that the protection thus guaranteed against future prosecution based on, or use against him of, any disclosures he might have made was inadequate in any respect. And it has been established that immunity broad enough to cover the right lost can be fairly substituted for the Constitutional privilege against self incrimination, even where the Fifth Amendment itself is directly applicable.[13]

As this Court stated in *Ullmann* v. *United States*:[14]

> "[T]he immunity granted need only remove those sanctions which generate the fear justifying invocation of the privilege: 'The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself,—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the amendment ceases to apply.' *Hale* v. *Henkel*, 201 U. S. 43, 67, 26 S. Ct. 370, 376, 50 L. Ed. 652. • • • Immunity displaces the danger. Once the reason for the privilege ceases, the privilege ceases."

Indeed, the total immunization of the petitioner herein characterizes the entire case and demonstrates the specious quality of his present assertion of unconstitutional invasion. Being kept wholly out of danger, the petitioner, as

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12. N. Y. Penal Law §§2447, 381, 584.

13. *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892); *Brown* v. *Walker*, 161 U. S. 591 (1896); *Hale* v. *Henkel*, 201 U. S. 43 (1906); *Regan* v. *New York*, 349 U. S. 58 (1955); the failure of state-granted immunity to cover possible federal prosecution, moreover, is no material defect barring the state from conducting an investigation under the fullest measure of immunity available to them to accord. *Knapp* v. *Schweitzer*, 357 U. S. 371 (1958).

14. 350 U. S. 422, 431, 439 (1956).

a witness in a valid legislative proceeding, is without the pale of the legitimate concern of the Constitution.

The petitioner's secure position is further evident from additional circumstances. For example, if there might be said to be a "target" for the investigation in question, it assuredly was not the petitioner. The investigation was stimulated by public disclosures concerning his brother's release on parole. Its aim was to discover possible corruption in the State Parole Commission and recommend remedial measures. The role of the petitioner was purely that of a witness who might have information of value to the Committee.

As a witness, the petitioner enjoys no standing to inquire into or challenge the Committee's sources of information. The information flowing to a legislative committee comes from a variety of tributaries—some reliable, others doubtful. Its questions may be based upon the most tenuous information or on no information at all. Basically, questions seek facts, they do not accuse or condemn; a question is not "evidence" even in a trial. To allow a witness, who is adequately protected, to explore these tributaries can only cause delay and confusion to the legislature without any corresponding benefit to the witness. As the Court said in *Norwegian Nitrogen Products Co.* v. *United States*,[15] a commission hearing "does not include a privilege to ransack the records of the Commission, and to subject its confidential agents to an examination or to all that they have learned." Surely a like rule applies to legislative investigations.

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15. 288 U. S. 294 (1933).

Moreover, it is apparent from the nature of the Committee's work that its function was wholly investigatory. This was no quasi-judicial tribunal whose deliberations could adjudicate or affect the rights or position of the petitioner. As a witness in such a proceeding, his access to the due process provision of the Constitution is accordingly limited severely.[16] This Court's discussion of the differing applications of due process in the functional dichotomy, set forth in *Hannah* v. *Larche*,[17] is illuminating:

> "'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

16. In analogous situations involving fact-finding agencies this Court has held that due process is not violated when a witness' attorney is excluded from the hearing room [*In re Groban*, 352 U. S. 330 (1959); *Anonymous* v. *Baker*, 360 U. S. 287 (1959)].

17. 363 U. S. 420, 442-443 (1959).

> An analysis of these factors demonstrates why it is that the particular rights claimed by the respondents need not be conferred upon those appearing before purely investigative agencies, of which the Commission on Civil Rights is one."

Entirely apart from the petitioner's lack of standing to challenge the derivation of the Committee's questions, the courts themselves have repeatedly declined to intrude in the self-informing processes of a legislative body. Under honored concepts of federalism as well as the separation of legislative and judicial functions, supervision by this Court is limited by the vital right of a state legislature to conduct information-gathering investigations legitimately related to valid legislative purposes. As this Court has said, "Experience admonishes us to tread warily in this domain."[18] Judicial restraint, therefore, wisely limits supervision of the functions of a legislative committee.[19]

The basis for the long respected independence of the legislative operation was clearly set forth in two leading opinions of the District of Columbia Circuit Court of Appeals. In *Hearst* v. *Black*,[20] it was said:

> "The Constitution has lodged the legislative power exclusively in the Congress. If a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded. Nothing is better settled than that each of the three great depart-

18. *United States* v. *Rumely*, 345 U. S. 41, 46 (1952).

19. See, *McGrain* v. *Daugherty*, 273 U. S. 135 (1927).

20. 87 F. 2d 68, 71-72 (D. C. Cir. 1936).

ments of government shall be independent and not subject to be controlled directly or indirectly by either of the others."

In *Barsky* v. *United States*,[21] the court stated that the remedy for legislative misconduct by a committee is with the parent body or with the people:

> "The remedy for unseemly conduct, if any, by Committees of Congress is for Congress, or for the people; it is political and not judicial. 'It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' The courts have no authority to speak or act upon the conduct by the legislative branch of its own business, so long as the bounds of power and pertinency are not exceeded, and the mere possibility that the power of inquiry may be abused 'affords no ground for denying the power.'"

Finally, it should be pointed out that, despite the broad language of *Silverthorne Lumber Co.* v. *United States*,[22] there is no absolute ban on the use of illegally obtained evidence. This Court has held that indictments will not be quashed although based on illegally obtained or other incompetent evidence.[23] Similarly, illegally obtained evidence, as well as its fruits, may be used against one not aggrieved by the manner of its acquisition.[24] These cases,

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21. 167 F. 2d 241, 250 (D. C. Cir. 1948).

22. 251 U. S. 385, 392 (1920).

23. *Holt* v. *United States*, 218 U. S. 245 (1910); *Costello* v. *United States*, 350 U. S. 359 (1956); *Lawn* v. *United States*, 355 U. S. 339 (1958).

24. *Goldstein* v. *United States*, 316 U. S. 114 (1942); *United States* v. *Costello*, 255 F. 2d 876 (2nd Cir. 1958); *Dorsey* v. *United States*, 174 F. 2d 899 (5th Cir. 1949) cert. denied 338 U. S. 950.

while not directly in point, demonstrate that whatever infirmity might result from the improper gathering of information, it is not an indelible taint which inheres in the evidence itself and infects any and all subsequent use of it.

In sum, the protection afforded to the petitioner by the United States Constitution is not unqualified. The constitutional concern is to insure that the citizens of the States are not deprived of substantial rights by the action of government except by due process of law. The nature of the Joint Legislative Committee hearing, the status of the petitioner before that body, and the immunity awarded him were such that the petitioner had the full benefit of due process of law.

For all the foregoing reasons, it is clear that the due process clause of the Fourteenth Amendment will not reach the proceedings before the Joint Committee of the New York Legislature, and the petitioner's conviction for refusal to answer questions put to him by that body is perfectly consonant with the protections of the United States Constitution.

## POINT III

**The eavesdropping by the prison officials did not violate the Fourth or Fourteenth Amendments to the United States Constitution [answering petitioner's Points I and II (brief, pp. 6-29)].**

The petitioner contends that information utilized by the legislative committee was illegally and immorally obtained. Specifically, he claims that the eavesdropping constituted an illegal search and seizure in contravention of the Fourth Amendment to the Constitution (brief, Point I, pp. 6-13). Further, he maintains that the due process clause of the Fourteenth Amendment was violated by what he terms the "immorality of the State's conduct" (brief, Point II, pp. 13-29).

**As to the Fourth Amendment**

As petitioner initially admitted (petition p. 9), at the time the eavesdropping occurred in this case (February, 1957) it was "not illegal or criminal." Electronic eavesdropping was an area where technological progress had outdistanced the law. This situation was promptly and adequately rectified in New York State by legislation which became effective in July, 1957. Pursuant to Sections 738 through 745 of New York Penal Law, eavesdropping, like wiretapping, may be accomplished today only by specified law enforcement officials upon a court order or where specially justified by the exigencies of the situation.[25] Of course, unlike wiretapping, disclosure of an overheard conversation is not criminal under federal law.

25. See also N. Y. Code Crim. Proc. §813(b).

This Court has recently had occasion specifically to consider eavesdropping in relation to the constitutional proscription against unreasonable search and seizure. *Silverman* v. *United States*,[26] promulgated a clear standard: to constitute an unconstitutional invasion, eavesdropping must be accompanied by some physical intrusion into an area protected by the Fourth Amendment.

In *Silverman*, it will be recalled, "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioner." The penetration was made when a "spike" microphone was driven into the wall of a house, making contact with the heating apparatus which served as a conductor for sound and enabled the government agents to overhear conversations taking place throughout the house.

The facts of the *Silverman* case have no analogue here, since the record indicates that the eavesdropping in question occurred in a State prison where one of the participants was a prisoner (R 155-8) necessarily subject to the constant supervision and observation of his jailors. No home was violated here; the eavesdropping occurred in a government building where the eavesdroppers were rightfully and lawfully present. It is clear that such conditions do not meet the *Silverman* test of intrusion into a protected area.

The petitioner vainly tries to bring this case within the ambit of *Silverman* by alleging—again without any reference to the record—that the prison officials, in some un-

26. 365 U. S. 505 (1961).

explained way, represented and assured the prisoner and the petitioner that they would have complete privacy in the prison visitor's room. Not only is this allegation contrary to the laws of New York[27] and the regulations of the jail,[28] but it is substantially refuted by the record itself. For it is manifest from the overheard conversations themselves that the parties knew or suspected that they were under official surveillance. At one point, they explicitly say that they cannot talk freely there (R 315). When they do speak of significant matters, the style is eliptical, cryptic, and unmistakably guarded (R 315-31). Parts are whispered, inaudible, or in a foreign tongue. References are veiled, no names are mentioned, and the entire conversation is carried on with an evident and well-founded awareness that a prison is not a place where a prisoner can expect privacy. Clearly, even if an aura of privacy was offered by the authorities, the Lanza brothers did not accept it as such.

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27. N. Y. Correction Law §500(c) in part provides:

"Convicts under sentence shall not be allowed to converse with any other person except in the presence of a keeper."

28. The N. Y. State Commission of Correction, Regulations for Management of County Jails, provide, in part:

"The law requires that visitors be carefully supervised to prevent passing in of weapons, tools, drugs, liquor and other contraband" (p. 27).

"In jails where a visitors' booth is provided, the safekeeping of prisoners, especially those held for serious crimes, will be best insured if the booths are used for visits. Where there are no booths, and where prisoners are permitted to receive visitors in the corridors or jailer's office, visits should be closely supervised. Experience has shown that laxity in supervising visitors and searching packages has resulted in escapes, assaults on officers and serious breaches of discipline" (p. 27).

"All parts of the jail should be searched for contraband at frequent irregular intervals" (p. 11).

Although the record is not clear as to where the microphone was placed in the instant case, *Goldman* v. *United States*,[29] would seem dispositive of the issues presented. In *Goldman*, the federal agents placed a "detectaphone" against the wall in a room adjacent to the one in which the conversation took place. This Court admitted the eavesdropped information, recognizing that the federal agents were lawfully present and had not intruded into an area protected by the Fourth Amendment.

**As to the Fourteenth Amendment**

In support of his assertion of a violation of due process in that the eavesdropping conducted here was immoral, the petitioner relies on authorities which fail to support his position.

First, he cites *Rochin* v. *California*,[30] a case which involved the violent physical invasion of the defendant's person to extract morphine tablets from his stomach. *Rochin*, in its own terms, "put to one side cases which have arisen in State courts through modern methods and devices for discovering wrongdoers and bringing them to book."[31] Further, the scope of the *Rochin* rule has been limited to cases in which there has been an invasion of the human body effected in a "brutal" and "offensive" manner.[32]

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29. 316 U. S. 129 (1942).

30. 342 U. S. 165 (1952).

31. 342 U. S. at p. 174.

32. In *Breithaupt* v. *Abram*, 352 U. S. 435, 437 (1957).

The applicability of the *Rochin* doctrine was further limited by *Irvine* v. *California*.[33] In factual context similar to that of *Silverman*,[34] and far more aggravated than the present case, this Court held that there had been no violation of due process. The state officers in *Irvine* secreted a microphone for over a month in the defendant's home, first in a hall, next in the bedroom and finally in a closet. Each time the microphone was installed, the officers entered the defendant's home using a pass key they obtained from a locksmith. The Court noted that "[f]ew police measures have come to our attention that more flagrantly, deliberately and persistently violated the fundamental principles declared by the Fourth Amendment;" yet the Court held due process inapplicable and affirmed the conviction, stating:

> "However obnoxious are the facts in the case before us, they do not invoke coercion, violence or brutality to the person, but rather a trespass to property, plus eavesdropping."[35]

Since this Court rejected the *Rochin* due process rule in the factual situation presented in *Irvine*, no plausable argument can be made for the application of that rule here where the record establishes that no home was violated; that no trespass occurred; and that no brutality, violence or fraud was utilized.

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33. 347 U. S. 128 (1954).

34. See note 25, *supra*. It is significant that the petitioner views the instant case as indistinguishable from *Silverman*.

35. Insofar as *Irvine* involved the admission at a state trial of evidence which might be regarded as the product of an unlawful search, the decision might not survive the recently announced rule of *Mapp* v. *Ohio*, 367 U. S. 643 (1961).

In furtherance of his due process claim the petitioner contends that *Leyra* v. *Denno*,[36] is indistinguishable from the present case. *Leyra* involved a coerced confession from a "physically and emotionally exhausted" defendant whose "ability to resist interrogation was broken to almost trance-like submission by use of the arts of a highly skilled psychiatrist." Again his reliance is misplaced.[37] Without belaboring the obvious, some of the principal distinctions are: first, there is no coercion, force or fraud involved in this case—the issue is eavesdropping not coerced confession; second, the evidence, or anything tainted by it, was never introduced in a prosecution against the petitioner—in fact, in this case the petitioner placed the overheard conversations in evidence at the trial; third, the petitioner was convicted of an entirely different crime than the one indicated by the overheard information; and finally, the petitioner here was given immunity from prosecution for the underlying crime.

In contrast to the repugnant atmosphere of the *Leyra* events, the present facts evince a reasonable use of state power. While it may be argued that the unauthorized eavesdropping in this case would have been illegal under the subsequently enacted law of New York, it can be just as forcefully maintained that, had the statutes been in effect at the time, the sheriff could have obtained a court order permitting the eavesdropping. For, in the light of the suspicious circumstances attending the prisoner's release on parole, efforts to learn the identities of the persons who

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36. 347 U. S. 556 (1954).

37. See opinion of the Appellate Division in the instant case, R 292-298; 10 App. Div. 2d 315 (1st Dept. 1960).

may have interceded for him was hardly an arbitrary and unreasonable investigation.

In addition, the authorities cited by the petitioner to support his claim of "immorality" are not in point. In each case,[38] the adverse criticism was directed at an alleged interference with the attorney-client relationship—a different issue than that involved here. Moreover, the petitioner distorts the remarks of the Governor and the Committee counsel. The Committee counsel's remarks on oral argument of an appeal were likewise directed at the alleged breach of the attorney-client relationship.[39] Governor Harriman's comment was not directed at this case, but at uncontrolled eavesdropping. In addition, the Governor's message, which indicates that he had vetoed similar legislation in the past because it failed to make provision for law enforcement use of eavesdropping, refutes the petitioner's claim that legislation was spontaneously brought about as a result of this case.[40]

In the last analysis, there is nothing inherently immoral or unethical in the use of eavesdropping equipment.

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38. *Lanza* v. *Joint Legislative Committee*, 3 N. Y. 2d 92 (1957) *cert. denied* 355 U. S. 856 (1957); *Matter of Reuter (Cosentino)*, 4 App. Div. 2d 252 (1st Dept. 1957); *Lanza* v. *Joint Legislative Committee*, 3 App. Div. 2d 531 (1st Dept. 1957).

39. In *Lanza* v. *Joint Committee*, 3 N. Y. 2d 92 (1957) the New York Court of Appeals noted that "It is true, as referred to in Judge Desmond's opinion, that the committee counsel stated upon the argument that the intentional secret interception of a confidential communication between attorney and client in the counsel room of a prison is repugnant, but it is also true that he offered to the court the minutes of the committee's hearing which, he stated, would demonstrate beyond doubt that this simply did not take place here."

40. N. Y. Sessions Laws [McKinney's 1958 (p. 1837)].

Stealth and disguise are necessary and proper techniques of investigation utilized since law enforcement began. Vital evidence is not normally available except by dint of such measures. The acceptance by the New York legislature of eavesdropping, under supervised conditions,[41] indicates that community morality is not offended by this special means of penetrating the guarded gates of criminal enterprise. Rather than unconstitutional "immorality," the use of electronic equipment in proper circumstances is an obligation of conscientious law enforcement. Indeed, as this Court has observed: "[m]odern community living requires modern scientific methods of crime detection lest the public go unprotected"[42]

## Conclusion

***The judgment of conviction should be affirmed.***

Respectfully submitted,

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March, 1962

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41. N. Y. Penal Law, §739.

42. *Breithaupt* v. *Abram*, 352 U. S. 432 (1957).